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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

CHARLES G. RHODES,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles G. Rhodes, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this cause on August 11, 1960.

OPINIONS BELOW

Copy of the judgment of the United States District Court[1] is appended as Appendix I hereto (A. p. 25).[2]

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[1] The District Court referred to in this petition, unless otherwise indicated, is the United States District Court for the Northern and Southern Districts of West Virginia, sitting at Huntington, West Virginia.

[2] The abbreviation "A" refers to the Appendix in this petition.

The opinion of the Court of Appeals is reported in ..... Fed. (2d) ..... A copy of the opinion and the judgment of the Court of Appeals is appended as Appendix II (A. p. 34).

JURISDICTION

Jurisdiction to review by writ of *certiorari* the judgment of said Court of Appeals entered August 11, 1960, is invoked under the provisions of 28 U. S. C. A., Section 1254. On September 6, 1960, upon motion therefor by petitioner, said Court of Appeals stayed its mandate on said judgment, upon condition that a writ of *certiorari* be filed with this Court within the time provided by law (A. p. 41). On the 8th day of September, 1960, within said thirty days' period for filing this petition, this Honorable Court, by order, extended the time to file to and including October 10, 1960 (A. p. 44).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis for Federal jurisdiction in the United States District Court was by virtue of an indictment returned against petitioner by the Grand Jury charging petitioner with a violation of Section 1014, Title 18, of the United States Code.

QUESTIONS PRESENTED

Whether the petitioner was denied a fair trial and denied his rights as guaranteed by the Fifth Amendment to the United States Constitution as a result of the District Court's refusal to permit an essential element of his defense to be presented to the jury. This essential element was the proof of lack of criminal intent on the part of the petitioner, as

offered through an expert psychiatric witness. An additional question involved is, further, whether petitioner was denied his Constitutional rights to a fair trial, heard by an impartial judge and jury, since in the trial of the case the trial Court interfered in the prosecution of the petitioner and evidenced its opinion of petitioner's guilt to the jury, through the Court's constant interruptions in the taking of testimony and through its charge to the jury.

STATUTES INVOLVED

Involved herein is simply Title 18, Section 1014, of the United States Code, a copy of which statute is appended as Appendix IV (A. p. 45).

STATEMENT OF THE CASE

The questions here presented arise from the trial of the Government's case against petitioner in the District Court, the admissibility of evidence, and the conduct of the trial Court.

Petitioner was indicted by the Grand Jury sitting in the District Court, for violation of Section 1014 of Title 18 of the United States Code. The indictment charged that the accused knowingly filed false statements and reports with the Huntington Federal Savings and Loan Association in order to obtain a $20.000.00 loan. The alleged false statements and reports consisted of an alleged forged deed of trust and note given by petitioner to secure the amount of said loan. The case was set down for trial before a jury in that Court, the Honorable Harry E. Watkins, Judge of said Court, sitting as trial judge. The trial commenced on the 23rd day of November, 1959, and continued in the taking of

testimony until the 25th day of November, 1959, when the jury returned a verdict of guilty against petitioner.

During the trial of the case, the Court interrupted counsel on numerous occasions and elicited testimony from the witnesses which petitioner contends was prejudicial to him. The Court also refused to allow testimony of a psychiatrist, offered by the petitioner, to be introduced, which evidence was offered to prove petitioner's lack of criminal intent in committing the crime charged.

The petitioner's defense was that he was a real estate broker and acted as agent for Dr. Glenn C. Dowell in handling Dr. Dowell's property in the city of Huntington, West Virginia. It was upon this property that the loan was procured through the execution of a note and deed of trust in the name of Dr. Dowell and his wife signed by the petitioner. Petitioner's defense was that he had a power of attorney from the doctor and his wife, authorizing him to do what was necessary in conjunction with handling their real estate. Although the power of attorney was never introduced into evidence, it having been lost, as petitioner contends, it was, nevertheless, one of his defenses. The second defense was the expert opinion of Dr. Thelma V. Owen, whose evidences was not admitted by the trial Court.

On January 4, 1960, the Honorable trial Judge, upon the verdict of guilty, imposed a sentence upon the petitioner of twenty-two months in the custody of the Attorney General of the United States, and further imposed a fine of Three Thousand Dollars (A. p. 25).

Whereupon, a motion was made on behalf of the petitioner to enlarge the petitioner at bail pending an appeal to the Court of Appeals for the Fourth Circuit. The motion for

bail was denied by the Court, and a subsequent motion before the Court of Appeals was sustained and petitioner was enlarged at bail in the amount of Five Thousand Dollars. The opinion of the Court of Appeals appended hereto in Appendix II (A. p. 34).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided an important federal question involving the administration of criminal justice, as it pertains to the rights of an accused to present his defense through witnesses called on his behalf and to the rights of an accused to a fair trial. The additional question involved is whether by the ruling of the trial court and the Court of Appeals, those courts have ruled in conflict with the decisions of this Court and those of other Courts of Appeals.

In the trial of this case in the lower Court, the defendant offered the testimony of Dr. Thelma V. Owen, which testimony is fully set out in the appendix filed in the Court of Appeals (C. A. A. pps. 33 through 40).[3] The testimony offered on behalf of defendant by this witness appears in the record as vouched testimony, since the trial Court preferred to rule on its admissibility prior to it being heard by the jury.

The qualifications of Dr. Thelma V. Owen appear to be quite elaborate and substantial. Her testimony reveals that she is a qualified psychiatrist, licensed to practice in the

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[3] C. A. A. refers to Court of Appeals Appendix.

states of West Virginia, Michigan, and Maryland. She is a diplomat of the National Board of Examiners. She was employed at the Federal Reformatory for Women at Alderson, West Virginia, and her duties included interviewing inmates regarding their attitudes toward crime and possible rehabilitation. Her further duties consisted of examining inmates as to their intent in the commission of crimes. She has written several articles on the subject of psychiatry. She has practiced her profession for many years. She is a fellow of the American Psychiatric Association, which is one of the highest honors that can be bestowed upon a physician in the psychiatric field.

Her testimony reveals that approximately twenty days prior to the trial upon the indictment, she examined the petitioner for the first time, and two weeks later examined him again. She stated that she proceeded in an examination of the petitioner in accordance with good standards of psychiatric treatment and in accordance with the methods used by leading authorities in this field. The crux of the testimony of Dr. Owen relates to the lack of specific intent to commit the offense with which the petitioner was charged. At page 189 of the original transcript of testimony,[1] the following examination took place:

> "Q. Now I will ask you, Dr. Owen, based upon your psychiatric examination and study of Charles Rhodes, in your opinion, did Charles Rhodes knowingly make a false statement when he signed the name of Glenn C. Dowell and caused the name of Norma L. Dowell to be made to a deed of trust and note and delivered them to the Huntington Federal Savings and

[1] The original transcript of testimony has been filed in the Court with the original record.

Loan Association on December 13, 1954?

Mr. Daugherty: Now, your Honor, please, I object.

The Court: The witness may answer for the record. I will rule on it later.

The Witness: A. It is my opinion that he did not.

Mr. Greene: Q. That he did not knowingly make . . .

A. Did not knowingly make a false statement.

Q. Based upon your psychiatric examination and study of Charles Rhodes, in your opinion, did he knowingly forge the name of Glenn C. Dowell and knowingly cause the name of Norma L. Dowell to be forged on the said note and deed of trust?

A. In my opinion, he did not.

Mr. Daugherty: I object, your Honor.

The Court: You better state your objection if you wish to. I mean note your objection. You have not made any objection until after she had answered.

Mr. Daugherty: Yes, sir.

The Court: You object to those questions?

Mr. Daugherty: I do, your Honor.

The Court: Any other questions?

Mr. Greene: Your witness.

The Court: The objection is sustained. I think this is improper evidence. You are excused, Doctor."

The charge upon which the petitioner was found guilty is found under Title 18, Section 1014, of the United States Code, which reads in part:

> "Whoever knowingly makes any false statement or report or wilfully over-values any land, property or security, for the purpose of influencing in any way the action of . . . any federal intermediate credit bank . . ." (A. p. 45).

The statute contains the word "knowingly", which has been held to mean "intentionally". Concerning said word and the ramifications thereto, the question of the intent of the accused becomes not only important but critical in the prosecution for the Government. See the case of *Morissette* vs. *United States*, 72 S. Ct. 240, 342 U. S. 246, 96 L. Ed. 288. The *Morissette* case provides substantial precedent of the necessity of the proof of intent when the statute so provides, as in the case at bar. Petitioner deems it unnecessary to belabor this point, since neither the Government nor the Court of Appeals contended in any way that the statute did not require such intent. However, for the moment, it might be helpful to show the importance of the testimony offered, but refused, of the psychiatrist from a statement in *Morissette*:

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury."

The question of intent of an accused to commit a crime has been the subject of discussion in numerous cases. See *Holloway* vs. *United States*, 148 Fed. (2d) 665 (D. C.), wherein the psychiatric testimony became significant and wherein the Court established the tests of criminal responsibility. The tests of criminal responsibility have been ex-

panded to even reach the point of drunkenness, being indicative of lack of intent. See *Proctor* vs. *United States*, 177 Fed. (2d) 566.

It is significant in the case at bar to note that the Court of Appeals, in affirming the trial Court, held that the testimony of the psychiatrist was not admissible, due to the irregularity of the questions propounded to her by trial counsel. The Court of Appeals held:

> "We fully agree with the earnest intention of appellant's counsel, that the rules of evidence should not be applied in such a way as to interpose unnecessary barriers to communications between lawyers and physicians who appear as witnesses. However, the defense, if it had anything to communicate, failed not on account of barriers put in its path, but because of its own default on this issue. The Court did not exclude psychiatric testimony. Actually, none was offered, although the witness was a psychiatrist." (A. II p. 39).

The Court of Appeals maintained that the question asked of the psychiatrist hereto cited in this argument was an improper question to ask of an expert witness, since defense counsel did not establish a proper foundation for the question, and since the question was objectionable from the standpoint of its wording. The Court of Appeals, in effect, held that the question asked required a response going to the ultimate fact of guilt, which is a question for the jury to determine. Many cases can be cited which hold that the testimony of a psychiatrist or an expert witness, by necessity, goes to the ultimate fact or issue, but that such testimony does not bind the jury, since it should be weighed in the same manner as the testimony of non-expert witnesses. See

Meredith vs. *United States*, 238 Fed. (2d) 535, *Beaty* vs. *United States*, 203 Fed. (2d) 652, *Frankfeld* vs. *United States*, 198 Fed. (2d) 679.

On the other hand, the opinion of the Court of Appeals may relate to the lack of a foundation being established prior to the submission of the question to the witness. Petitioner contends that the foundation was, indeed, adequate as an examination of the testimony of the doctor will reveal. As heretofore stated, she testified that she examined Charle Rhodes, the petitioner, on two occasions prior to the trial of the case, in accordance with the standards prescribed by the leading authorities in her profession. On page 187 of the original transcript, the following question was asked of the psychiatrist:

> "Q. In examining a patient to find out what their intent or what their . . . why they do certain acts, what do you do in examining these persons?
>
> A. Well, when you are training you are given certain questions to ask and certain tests that you test memory and all . . . I've . . . now, if you will figure up you will find that I have been doing psychiatry for twenty-five years, so that I do it all through my history taking. I take all my own histories, and I have a regular routine that I go through. First I ask the patient to state the problem as he sees it. Then I drop it, drop that subject right then. And then I go back to the family history. Then I take the work history, then I take the marital history, and because I have to get my clues as I go along as to what made this individual behave in the fashion he is behaving right now.
>
> Q. And this method is recognized by leading au-

thorities in the medical and psychiatric field?

A. It certainly is. . . ."

She further testified that she saw Charles Rhodes on the 4th of November and again on the 16th, spending approximately an hour each time. She gave him a psychiatric examination, and the examinations were based upon her experience and her education in the psychiatric field; her method was recognized by leading authorities in the psychiatric field. The question was based upon this foundation, and it was sufficient to obtain the witness' expert opinion of the intent of Charles Rhodes, the petitioner. We contend that it is this type of testimony which the Court speaks of in the case of *Durham* vs. *United States*, 214 Fed. (2d) 862. That case allows greater latitude in the admission of evidence to remove "some of the barriers to communication between lawyers and physicians".

Approaching the testimony from another facet, that is, if it is assumed that a proper foundation was not laid preparatory to the rendering of the opinion of the psychiatrist, it was, nevertheless, admissible as lay testimony pertaining to the intent of the petitioner to commit the crime charged.

See the case of *Stewart* vs. *United States*, 247 Fed. (2d) 42, where there is evidenced the demanding sense of justice of the Federal Courts in permitting testimony of the intent of the accused to commit a crime. In the *Stewart* case, the Court places significance upon the testimony of the relatives and friends of the accused as to his mental capacity or his ability to form an intent. Considering Dr. Owen as a lay witness, would not her testimony be significant regarding the intent of the accused, subject only to the deterioration of that testimony by proper cross-examination?

This Honorable Court has in its opinion in *Morissette* established the same rule. Mr. Justice Jackson states:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provisional or transient notion. It is as universal in a mature system of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, 'But I didn't mean to', and has afforded the rational for a tardy and unfinished substitution of deterrents and reformation in place of retaliation and vengeance as the motivation for public prosecution."

It is significant that in *Morissette* the defense of the charge of stealing or taking Government property by the accused, based itself on the words of the accused that he did not intend to steal the property, he not knowing to whom it belonged. This is the same type testimony offered through Dr. Thelma V. Owen and the jury had a right to consider it, subject to the cross-examination of the Government. When the Court denied the right of introduction of the testimony, it denied the petitioner his rights to due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

II.

Rule 51 of the Federal Rules of Civil Procedure provides in lieu of the form of exceptions it is sufficient, when the ruling or order of a court is made or sought, that the party make known to the court the action which he desires the court to

take, or his objection to the action of the court and the grounds therefor. If no timely objection is made in the trial court, the objection is waived on appeal. In *Thayer* vs. *United States*, 168 Fed. (2d) 247, Tenth Circuit, the Court held as follows:

> "Complaint is made that a witness testified in respect to a certain record of the railroad company without it first being shown that the record was authentic or accurate, and also that another witness testified as an expert without his qualifications being first shown. But in neither instance was objection or exception lodged against the testimony on the ground now urged. Therefore, the question cannot be reviewed."

In *Litton* vs. *United States*, 177 Fed. (2d) 416, Eighth Circuit, the Court said:

> "It will be observed that the objection was based solely on the ground that the confession had not been voluntarily made. It was not claimed that the confession was not admissible because the *corpus delicti* had not been sufficiently established. This question not having been raised in the trial court, we must hold that it was waived."

In *United States* vs. *Douglas*, 155 Fed. (2d) 894, Seventh Circuit, affidavits which were made out in order to obtain on information were submitted to the jury, and this was claimed to be reversible error. The Government claimed that the Trial Court ignored the error for the reason that the action of the submission of the affidavit was neither excepted nor objected to by the defendant. The Court held:

> "True, as pointed out, the Court no doubt had knowledge that the affidavits were attached to the information at the time leave was granted to file, but

it does not follow that it had such knowledge at the time it submitted the information. Furthermore, it may be that the court presumed counsel for the Government would make it his business, as he should have done, to ascertain that these affidavits were detached. Counsel for the Government was a moving factor in the matter and must be held responsible for a procedure which, in our judgment, was unfair, prejudicial and attended with dangerous consequences".

The principles enunciated in the preceding cases should equally apply to the Government as well as to the defendant in a criminal matter. In the case at bar, it will be noted that the testimony of Dr. Thelma V. Owen was completely adduced before there was any objection by the Government (O. T. 189).[3] After the petitioner's attorney asked of the witness the question concerning the opinion of the expert as to the intent of Charles Rhodes in signing these legal documents in the names of the Dowells, the United States District Attorney objected. Thereafter, the Court advised the Government's attorney to note his objection, presumably to assign a ground for his objection. Although this suggestion was made by the Court, the Government's attorney never assigned any ground. The objection seems to go to the question, although it is not clear that this was the basis of the objection, since after counsel made the objection the Court excluded the entire testimony of this witness. Therefore, it could be assumed that the objection goes either to the qualifications of this witness or to the lack of a foundation for asking the question, or to the question itself. Since no grounds for the objection were stated, petitioner contends that the objection was waived and that the evidence of this

3 The letters "O. T." refer to the Original Transcript of testimony.

witness should have been read to the jury. To deny all of the introduction of the evidence is to deny petitioner a right to the very crux of his defense and thus deny him his rights to due process of law.

III.

To preserve the rights of the accused, the trial court should exercise restraint and care in order that the jury, before whom the case is tried, may not infer any partiality by the Court to either side in the case. Petitioner contends that in the case at bar the trial court continually interfered in the prosecution of the Government's case, to such an extent that the jury without doubt realized that the Court was partial to the Government's case.

In order for this Honorable Court to pass upon this matter, it will be necessary to refer to the various pages of the original transcript of testimony, which has been filed with the papers and proceedings in this Honorable Court.

By its various questions of the witnesses, the Court indicated its feelings in various manners. When the Government concluded its direct examination of its witness, Kermit E. McGinnis, an officer of the Huntington Federal Savings and Loan Association, the victim in this case, the Court examined the witness, in which examination the Court supplemented the testimony elicited by the Government attorney and supplied the necessary elements of proof of the false statements allegedly made by the petitioner. The testimony elicited by the Court tended to prove the forgery of the signatures of the parties concerned by petitioner (O. T. 16-18).

Again, upon re-direct examination of this witness, the Court again clarified the Government's position and showed that the allegedly forged signatures of Dr. and Mrs. Dowell to the deed of trust were acknowledged by petitioner as a Notary Public and that the Dowells were not present in this state on the date of the acknowledgment by the petitioner (O. T. 30-33).

Upon the examination of the witness, Virginia Wallis, who was a secretary of the victim bank, the Court, in furtherance of direct examination, elicited testimony which indicated that the money obtained by the petitioner would not have been paid to him had the witness known that the documents were not executed by the persons whose signatures were affixed to them (O. T. 38-40). The Court on page 40 makes the statement in the presence of the jury, as follows:

> "The Court: And I think that is important for anyone who had . . . and these people received these papers there and I think it is proper to know whether they relied on them being the personal signature of these two individuals and whether they granted loans . . . money . . . on the basis of that fact."

Petitioner contends that this is a statement by the Court indicative of its opinion that the petitioner had made a false representation when obtaining this loan.

The Court further, upon re-direct examination of the witness, Wallis, questioned the witness concerning the acknowledgment taken and proof that the persons executing the document, whose signatures were acknowledged by the petitioner in the State of West Virginia, were not actually in the state of West Virginia at the time that the acknowledgment was taken (O. T. 48-50).

On direct examination of the Government's witness, Carroll Fry, the Court clarified the direct examination of this witness regarding the deposit of the money received by the petitioner from the Huntington Federal Savings and Loan Association to his personal account. The testimony further tended to prove that Charles Rhodes had no business account in the name of Rhodes Realty Company (O. T. 54-57). Unquestionably, the jury must have attached significance to the Court eliciting this testimony from the witness, and the later point made by counsel for the petitioner that Charles Rhodes had an account in the name of Rhodes Realty Company, which was elicited from this witness upon cross-examination, had little effect when weighed with the evidence obtained by the Court. The question becomes pertinent when we consider the defense of the petitioner that he had a power of attorney to borrow this money and that the money was deposited in his business account. See page 62 of the original transcript, where the question was asked of the witness, Fry, on cross-examination as follows:

> "By Mr. Ketcham: Q. My point is, it was a business account, wasn't it?
> A. Yes."

Concerning the witness, Glenn Dowell, whose name was allegedly forged on the note and deed of trust by the petitioner to obtain the money in question, the Court clarified the direct examination of the Government by questioning the witness concerning his whereabouts at the time the petitioner acknowledged his signature on the documents at the Huntington Savings and Loan Association (O. T. 65-66). On cross-examination of this witness, certain inferences were raised by the petitioner that the money obtained from the loan was applied to repairs made upon property owned by Glenn Dowell which was being handled by the petitioner as

realtor and agent. The Court, through its further examination of the witness, attempted to tear down these inferences and left the jury with its opinion that the Court believed that no expenditures were made on behalf of the Dowells (O .T. 84-85). On recross examination of Glenn Dowell, after the defendant labored to raise the inference again that the money obtained was used for the purposes of the witness, the Court again interrupted to attempt to show that it was not the intention of the witness to borrow any money on his real estate to make repairs. Here we see that there is a struggle between defendant's counsel and the Court, the former showing the borrowing of money for the witness' use on his property and the latter showing that it was not. The evidence is somewhat contradictory. In such a case and under ordinary circumstances, the jury would discredit the witness. However, since the Court elicited the testimony detrimental to the accused, the jury surely would not consider the contradictions of the witness, being impressed with the testimony elicited by the Court.

Regarding the direct testimony of the Government's witness, Amy Casto, the Court reporter, who transcribed the evidence taken in a similar criminal case involving petitioner, the Government attempted to introduce parts of the testimony of the witness but failed to lay a foundation for same. The Court, after advising the Government's attorney that he had not laid a foundation (O. T. 121), proceeded to lay the foundation for this testimony through its own examination (O. T. 124). Taking into consideration that even if the Court should have assisted the Government's attorney in laying the foundation for the testimony of this witness, equal consideration and assistance should have been given defense counsel in attempting to get an essential element of the defense into the record with the testimony of Dr. Thelma

V. Owen discussd in I above. This procedure by the Court was not conducive to a fair trial.

The above excerpts of the testimony relate to the evidence of the Government in chief and it will be noticed that the questions asked by the Court were asked to strengthen the Government's case. On the other hand, the following relate to the interruptions of the Court as it pertains to the defense of the charge. The Court cross-examined the defendant, petitioner herein, in such a manner that it was evident that the Court did not believe his testimony, since the testimony of the accused related to his lack of knowledge of legal instruments and, more specifically, of the trust deed in question (O. T. 247-248). Further, the Court elicited from the witness testimony that the accused had never read a Notary certificate, although he had been a Notary for twenty years. The testimony, as elicited by the Court, could very probably have been considered by the jury as an indication of the Court's disbelief of the petitioner's testimony (O. T. 252-253). Also, in the cross-examination of the accused, the Court asked of the witness the following question (O. T. 259-260):

> "THE COURT: And I want to give you in all fairness, an opportunity of making any explanation that you want to the Court and jury. You say that you thought you had a power of attorney from both Dr. and Mrs. Dowell. When it came to signing this note and the deed of trust and also the check that you got for the loan of $20,000.00, it appears that you signed the name of Dr. Dowell and that you had someone else in a different handwriting to sign the name of Mrs. Dowell. Now, what explanation do you have for that if you had the right of signing both names and wanted that fact known to the bank so they could compare the

> signatures, why did you have some one else sign her name to all three of those papers?"

After the witness made an explanation, the Court then asked, "Is there any other explanation?" indicating that the reason given by the accused was not sufficient as far as the Court was concerned.

Considering the entire transcript, it is evidence that the Court mainly interrupted to clarify the direct testimony of the witnesses introduced by the Government, and further interrupted in the defense's evidence to clarify and to support the cross-examination of the Government. In effect, the Court assumed the task of the Government to prove its case, but did not intervene to assist the petitioner in proving his defense.

There are many cases involving similar instances of interference by the Court, and, although the interruptions may have been due to inadvertence, which we do not deny, nevertheless, petitioner contends that the interruptions worked to his prejudice and the same is error. See *Blumberg* vs. *United States*, 222 Fed. (2d) 946, where the Court, in holding that the Court inadvertently led the jury to the opinion that it had an interest in the case on the side of the prosecution, held:

> "Finally, it is far better for the trial judge to err on the side of abstention from intervention in the case rather than on the side of active participation in it, especially when the major part, if not all of his interruptions and interventions, though by chance rather than design, are, or seem to be, on, or tending to be on, the side of the Government."

See also the cases of *Hunter* vs. *United States*, 62 Fed. (2d) 217, *Fogarty* vs. *United States*, 263 Fed. (2d) 201, *Gomila* vs. *United States*, 146 Fed. (2d) 372, *United States* vs. *Carmel*, 267 Fed. (2d) 345, and compare the case of *Quercia* vs. *United States*, 289 U. S. 466. In truth, the Court of Appeals for the Fourth Circuit in *Holmes* vs. *United States*, 271 Fed. (2d) 635, in its opinion admonishes the trial court for similar practices.

IV.

Lastly, petitioner contends that he was deprived of a fair trial and his right to due process of law because of a supplemental charge given by the Court to the jury. This charge has been often called "the Allen charge".

The Allen charge has a long background, which needs no discussion in this petition. Suffice it to say, that the charge has been approved by this Court in the case of *Allen* vs. *United States*, 164 U. S. 492, 17 S. Ct. 154; 41 L. Ed. 528. However, although the charge has been approved, Courts of Appeals have held that the charge should be given in the spirit of fairness and without any indication that the Court is coercing a verdict. The transcript of evidence indicates on page 296 that counsel for defendant objected and excepted to the Court's charge and asked that the Court give a counter-instruction for the defendant to evenly balance the statement of the Court, "Nothing is known with absolute certainty." Defense counsel wanted further charge to the jury apparently on "pre-sumption of innocence" and "reasonable doubt".

It appears from the transcript that at 1:25 o'clock P. M. on November 24, 1959, after the Court had given a lengthy charge (O. T. 276-283), the jury retired to consider its verdict. At 5:15 o'clock P. M., after a period of fifty minutes

of deliberation, the jury was called to the courtroom and asked by the Court whether they had reached a verdict. The foreman of the jury reported that they had not and the Court thereupon excused them until 9:30 o'clock the next morning. On November 25, 1959, at 9:30 o'clock A. M., the jury again retired to its room to consider of its verdict. At 11:00 o'clock A. M., after one hour and thirty minutes of further deliberation, the jury again returned to the Courtroom and requested that the instructions of the Court be re-read; whereupon, the Court again read its charge to the jury. At 11:25 o'clock A. M., the jury again retired to consider of its verdict, and at 12:22 o'clock P. M., they were again called to the Courtroom. Upon their return, the Court asked the jury whether they had agreed upon a verdict, and it is significant to note that the foreman reported that the jury was hopelessly deadlocked (O. T. 293). After retiring for lunch and returning to the Courtroom, the Court then, without request from either counsel or the jury, gave the so-called "Allen instruction". (The Allen instruction, as the Court gave it, is set out in the Appendix to petitioner's brief in the Court of Appeals at page 40).

There was no necessity to give the Allen instruction, since the Court in its original charge had instructed the jury to the same effect as in the supplemental charge (O. T. 280). By reading this supplemental charge to the jury, the Court pinpointed specific matters and left the jury with only the thought of arriving at a verdict, rather than considering the entire charge of the Court given before their initial retirement. Taken together with the interruptions of the Court, as discussed in III above, petitioner contends that the jury was left with the impression that the Court insisted upon a verdict.

In *Stewart* vs. *United States*, 300 Fed. 769, the Court of Appeals held the Allen instruction to be had under the cir-

cumstances given. In its able opinion, the Court, speaking of the charge, stated:

> "It tended too strongly of coercion of the minority of the jury to surrender their honest convictions in order to acquiesce in the convictions of the majority."

Perhaps had the charge been given alone, it would have been proper, but Courts of Appeals have held on numerous occasions that taking the charge in consideration with other matters pertinent to the trial of the case the charge may be bad. See *Brasfield* vs. *United States*, 272 U. S. 448, 47 S. Ct. 135; 71 L. Ed. 345, where this Honorable Court condemns the practice of asking the jury of the divisions of its members as to conviction and acquittal and then following with the Allen instruction. See also *United States* vs. *Samuel Dunkel & Company*, 173 Fed. (2d) 506. *Cook* vs. *United States*, 254 Fed. (2d) 871, and *United States* vs. *Mack*, 249 Fed (2d) 321.

In the case of *Nick* vs. *United States*, 122 Fed. (2d) 660, at page 64, the Court of Appeals, in discussing the Allen instruction, sustained the lower Court in giving same, by stating:

> "If such statement is made in the face of an existing disagreement in the jury, it is quite evident that its entire force would be felt as applying to an existing situation which had developed. Language which might be innocent if uttered before submission of the case to the jury might be regarded as harmful if applied to a specific existing disagreement."

In *Samuel Dunkel, supra*, the Court stated:

> "The very failure of a jury quickly to reach a conclusion has been suggested as an indication of a

balance so delicate that any error on the Judge's part may turn the scale."

It is apparent that the division of disagreement was delicate in the case at bar. The jury had considered of the verdict for three hours and seventeen minutes, and had announced that they were hopelessly deadlocked. By giving the Allen instruction, the Court, in effect, told the minority to conform to the majority. This language, which might have been innocent if uttered at the time of the original charge, which it was, when re-uttered after this delicate balance existed, was, as petitioner contends, coercion of the minority of the jury. Justice demands that defendant be given a fair trial, and partiality of the Court or coercion of the jury denies the defendant, the petitioner, that right.

CONCLUSION

We submit that the questions presented in this petition should be approached with the thought in mind that the very basic fundamentals of justice and constitutional rights of the petitioner are involved. He is guaranteed a fair trial conducted by an impartial Court and a jury of his peers, freely deciding the case upon their convictions, controlled only by the law as it is directed by the Court. Petitioner, therefore, respectfully submits that this petition for a writ of *certiorari* should be granted.

SAMUEL D. LOPINSKY,
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ARTHUR T. CICCARELLO,
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Attorneys for Petitioner.

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA

vs. : No. 8609—Upon Indictment for Vio. of T. 18, Sec. 1014, U. S. C.

CHARLES G. RHODES

JUDGMENT

On this 4th day of January, 1960, came the attorney for the government and the defendant appeared in person and by Chad W. Ketchum, his counsel, in answer to the verdict of "guilty" previously rendered by a jury herein on November 25, 1959.

IT IS ADJUDGED that the defendant has been convicted upon the verdict of guilty of the violation of Title 18, Section 1014, United States Code, as charged in the Indictment herein; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY-TWO MONTHS, said sentence to begin as of this date, and that the

United States of America do recover of and from the said defendant a fine of THREE THOUSAND DOLLARS, the Court having taken into consideration the time the defendant has already been confined in jail awaiting the entry of judgment and sentence of the Court before pronouncing sentence and no further credit will be allowed for such time spent in jail; that no costs be recovered from said defendant, and that said Charles G. Rhodes is remanded to the custody of the Marshal of this court.

IT IS FURTHER ADJUDGED that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to United States Penitentiary, Lewisburg, Pennsylvania.

(Signed) HARRY E. WATKINS,
United States District Judge.

(Entered January 4, 1960,
Civil Order Book 6, Page 883)

APPENDIX II

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8043.

Charles G. Rhodes,
Appellant;
versus
United States of America,
Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.
Harry E. Watkins, District Judge

On Motion of the Appellant for Bail Pending Appeal.

(Argued on Oral Motion January 12, 1960.
Written Motion Filed January 27, 1960.)
(Motion Granted February 9, 1960.)

Before Sobeloff, Chief Judge, and Haynsworth and Boreman, Circuit Judges.

Arthur T. Ciccarello in support of Motion, and Duncan W. Daugherty, United States Attorney, in opposition to Motion.

Sobeloff, Chief Judge:

This is the application of the defendant, Charles G. Rhodes, to be admitted to bail during the pendency of his appeal in this court.

On January 4, 1960, the applicant was convicted in the District Court for the Southern District of West Virginia of knowingly making false statements to a Federal Savings and Loan Association to obtain a $20,000 loan, and he was sentenced to twenty-two months imprisonment and a fine of $3,000. The District Judge, in overruling the defendant's motion for bail pending appeal, filed no opinion or memorandum, made no findings and gave no reasons that have been called to our attention. According to the brief of the Government here, in opposition to bail, no additional evidence was heard on this question. We do not know if the Judge denied bail in the belief that the appeal was frivolous or for delay, or because there was in his opinion danger that the defendant would abscond, or because he thought the defendant would commit further violations if allowed to remain at large. The Government made a blanket assertion of all three of the above grounds in its brief and in oral argument.

Because of the importance and recurrent nature of this general question, we think a statement of our views would be useful. Before 1956, Rule 46(a)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., permitted bail only if the case involved a "substantial question" for the appellate court, and the burden of showing this was on the defendant. In that year, the Rule was amended so that now bail may be allowed pending appeal or petition for certiorari unless the grounds are "frivolous or taken for

delay." It has been held that the new rule effected a considerable change, liberalizing the granting of bail and putting the burden of proof on the Government where it opposes applications for bail.

Under both the old rule and the new, the legal merit of the question presented to the appellate court is the primary consideration in determining whether bail should be granted. In fact, in many of the reported opinions, the only question discussed is whether the appeal is "insubstantial or "frivolous."

Turning to the case before us, we cannot say that the appeal is frivolous or taken for delay. One of the defendant's allegations of error pertains to the trial court's holding inadmissible the opinion testimony of an expert witness, a psychiatrist, to the effect that the defendant, at the time he made the false statements to the Savings and Loan Association, did not "knowingly" do so. The defendant asserts that the testimony was offered to show that he lacked the requisite specific intent, an essential element of the crime. In characterizing this assertion of error as frivolous, the Government takes the position that the proferred expert testimony went to the ultimate issue, and was therefore inadmissible as an invasion of the province of the jury.

Without expressing any opinion on the merits of the respective contentions, we may at least say that the question is reasonably debatable. Courts have held that where a defendant is charged with a crime requiring proof of a specific mental state, such as a particular intent, expert testimony that the defendant did or did not have the required mental state is admissible. *People* v. *Wells*, 33 Cal. 2d 330, 202 P. 2d 53 (1949). The receptivity of courts to evidence of

this type is illustrated by *People* v. *Webb*, 330 P. 2d 130 (Cal., 1956) where even the opinion of a non-expert, who had observed the defendant, was held admissible on this issue. Such evidence is not to be confused with testimony seeking to show that the defendant is not guilty because of insanity, but is merely indicative of the absence of an essential element of the crime, by reason of the defendant's mental condition.

As to the claim that such evidence is inadmissible because it goes to the ultimate issue for the jury, Chief Judge Parker in *Frankfeld* v. *United States*, 198 F. 2d 679, 689, (4th Cir., 1952) pointed out:

> "In so far as it involved a matter of opinion, this related to a matter involving specialized knowledge, as to which the opinion of experts is unquestionably admissible, even though it related to a matter which is for decision of the jury."

This was recently followed by us in *Meredith* v. *United States*, 238 F. 2d 535 (4th Cir., 1956), where the expert's opinion was held admissible over the objection that it went to the ultimate issue in the case. It may be that the above cases are significantly distinguishable from the present case, or that an insufficient foundation was laid for the expert's conclusion, or that the testimony was inadmissible for some other reason. However, we do not decide the question; we merely note that the point which the appeal seeks to test is manifestly not "frivolous."

Although the most important factor to consider is whether the appeal is frivolous, there are other considerations which may justify the denial of bail pending appeal both under the old and new rules. The one most often mentioned is the liklihood of the defendant absconding. In practically all of

the reported cases in recent times where bail has been denied, the appeal has been deemed insubstantial or frivolous, or there was a specific finding that there existed real danger of the defendant becoming a fugitive. There has been no such finding in this case.

Furthermore, the present case is unlike those where bail has been denied on the ground that the defendant is a poor bail risk. The defendant here has no record of prior convictions, although the Government asserts that the defendant has in the past committed similar offenses of which he has not been convicted, and it is not denied that he has made restitution in all such cases, including the present. The allegation of prior offenses certainly is a factor to take into consideration in determining whether to allow bail, although charges against one are not entitled to the same weight as prior convictions.

On the other side are the factors that the defendant has a home and family, had been operating a real estate business in the community where he lived for many years, and is now employed to develop two real estate subdivisions in neighboring Ohio. He maintains a home in Ohio, it is said, so that he may be closer to his work. We cannot say that the Government has met the burden of demonstrating that the defendant is a poor bail risk. Nor has the Government, which has the burden, persuaded us that the defendant is likely to commit additional offenses if enlarged on bail. The considerations mentioned by Chief Justice Warren in the recent case of *Ellis* v. *United States*, 79 S. Ct. 428 (1959) are applicable here. There, bail was allowed after the refusal of both lower courts, as the defendant was given a relatively short sentence and the denial of bail was thought to deprive him to a large extent of the benefits of his right of appeal. In *Ellis*, he was a longtime resident of the dis-

trict where the court was, he owned property there, and he had always previously responded to the orders of the court.

In reaching the conclusion that Rhodes is entitled to bail, we are not unmindful of the deference due to the decision of the District Court. However, as noted above, there were no findings or reasons given by the District Judge for denying bail. In *Yates* v. *United States*, 252 F. 2d 568, 569 (9th Cir., 1958), a Smith Act case, the Court of Appeals, in allowing bail after the District Court's refusal, pointed out:

> "As to bail, if the trial court had made a positive determination that the defendant was a risk to respond to further orders of the court, we would be most reluctant to grant defendant's request for bail which has heretofore been denied in that court."

Where no reasons are given for the denial of bail, the action cannot be accorded the weight it would otherwise merit.

Also, we must take into account the principle that normally bail should be allowed pending appeal, and it is only in an unusual case that denial is justified. This was true even under the stricter Rule 46(a)(2) before 1956. *Williamson* v. *United States*, 184 F. 2d 280 (2nd Cir., 1950); *Christoffel* v. *United States*, 196 F. 2d 560 (D. C. Cir., 1951). With regard to bail pending appeal, Mr. Justice Douglas observed in *Herzog* v. *United States*, 75 S. Ct. 349, 351 (1955): "Bail is basic to our system of law . . . Doubts whether it should be granted or denied should always be resolved in favor of the defendant."

It would assist the Court of Appeals and Circuit Judges, to whom applications are made for bail pending appeal, if

District Courts made a statement of their reasons when they depart from the normal rule.

For the above reasons, the application for bail pending appeal is granted, bond in the amount of $5,000 to be posted with the Clerk of the District Court for the Southern District of West Virginia, upon approval of the surety by a Judge of that court.

So ordered.

APPENDIX II — (*Continued*)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8043.

Charles G. Rhodes,
Appellant,
versus
United States of America,
Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.
Harry E. Watkins, District Judge.

(Argued May 26, 1960 Decided August 11, 1960)

Before Sobeloff, Chief Judge, and John Paul and Thompson* District Judges.

Arthur T. Ciccarello and Samuel D. Lopinsky for Appellant, and Duncan W. Daugherty, United States Attorney, (Ned O. Heinish, Assistant United States Attorney, on brief) for Appellee.

*Judge Roby C. Thompson, who concurred in this opinion, died before filing and announcement.

Sobeloff, Chief Judge:

Charles G. Rhodes, a real estate operator, was convicted of knowingly filing false statements and reports with the Huntington Federal Savings and Loan Association, in order to obtain a $20,000 loan. The false statements of which he was accused consisted of a deed of trust and note given as security for the loan, and purportedly signed by Rhodes' clients, Glen C. Dowell and Norma L. Dowell, his wife. Rhodes made it appear on the deed of trust that he took the acknowledgment thereto of the Dowell's signatures. Actually, according to the testimony, Rhodes himself signed Mr. Dowell's name and caused a woman clerk to sign the name of Mrs. Dowell to each of these instruments. The check of the Building Association covering the proceeds of the loan was likewise endorsed by Rhodes and the clerk in the names of the Dowells. It was cleared through Rhodes' bank account and he appropriated the proceeds.

The defendant interposed two defenses. The first, which the defendant does not make a basis of this appeal, was that a long time before the alleged forgery the Dowells had executed to him a power of attorney to collect rents, make repairs and disbursements, and obtain loans on the property. No such instrument was produced; Rhodes claimed it had been lost in moving. In negotiating the loan he did not purport to act under any power of attorney. The Dowells denied executing such a paper.

The second defense was that the defendant was "mentally incapable of *knowing* that he was perpetrating any fraud or doing anything improper." The present appeal rests chiefly upon the claimed error of the District Court in excluding the testimony of a psychiatrist offered in support of this defense.

While it is true that the defense of insanity was not advanced it was still open to the defendant to introduce phychiatric testimony to show that by reason of his mental condition he was unable to form the requisite intent of *mens rea* which is an essential element of the crime charged. An intent beyond the mere doing of the act is not invariably required. Where, however, it is inherent in the offense, or the statute creating it prescribes as part of the definition that a specific state of mind shall accompany the act, as this statute does, a full exposition of the pertinent evidence is permitted if properly tendered.

Long ago this was treated as established doctrine in *Hopt* v. *People*, 104 U. S. 631 (1881), where it was held appropriate to show the absence of a requisite mental state, whether due to drunkenness or *otherwise*. Psychiatric testimony, if it has a bearing upon this issue, has a rightful place in the record. The American Law Institute's Model Penal Code formulates the rule as follows:

> "Evidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." §4.02 (1) Tentative Draft #4 (1955).

The purpose of such testimony is to enlarge the vision and understanding of the triers of fact. It does not take the decision out of the hands of the jury, but allows those with specialized knowledge to enlighten the jury and enable it to perform its function intelligently. *Rhodes* v. *United States*, 275 F. 2d 78 (4th Cir., 1960) and cases there cited. In *Frankfeld* v. *United States*, 198 F. 2d 679 (4th Cir., 1952), Judge Parker made it clear that the ancient objection, that expert testimony must not relate to a matter which is for the decision of the jury, has been thoroughly ex-

pleaded. Modern courts admit pertinent opinion testimony of experts within the area of their special competency.

The psychiatrist's testimony in this case was not made the subject of a general proffer, but was vouched in the absence of the jury by permitting the psychiatrist, Dr. Thelma V. Owen, to take the stand, and a series of questions was addressed to her by defendant's counsel. At the conclusion of the interrogation the court sustained the prosecutor's objection. Thus the court had before it, and we have before us, the precise testimony which the defense desired to adduce. There was and there is, therefore, no need to speculate as to the character and scope of the testimony that was excluded from the jury's consideration by the court's ruling.

After establishing the witness' professional qualifications, which are not challenged, defendant's trial counsel conducted the following examination:

> "Q. Now I will ask you, Doctor, Owen, based on your psychiatric examination and study of Charles Rhodes in your opinion did Charles Rhodes knowingly make a false statement when he signed the name of Glenn C. Dowell and caused the name of Norma L. Dowell to be made to a deed of trust and note and delivered them to the Huntington Federal Savings and Loan Association on December 31, 1954?
>
> Mr. Daugherty: Now, Your Honor, please, I object.
>
> The Court: The witness may answer for the record. I will rule on it later.
>
> The Witness: It is my opinion that he did not.
>
> By Mr. Greene: Q. That he did not knowingly make—

Q. Based upon your psychiatric examination and study of Charles Rhodes, in your opinion did he knowingly forge the name of Glenn C. Dowell and knowingly cause the name of Norma L. Dowell to be forged to the said note and deed of trust?

A. In my opinion he did not."

There was no further elaboration. There was no attempt to point out that in Dr. Owen's opinion—if such was her opinion—the defendant, by reason of a delusion as to the existence of a power of attorney, or by reason of other mental disorder, was unable to *knowingly* make a false statement. Not only was nothing of the kind shown, but the testimony is completely consistent with the idea that Dr. Owen credited the defendant's assertion that he had a power of attorney authorizing him to sign the names of Glenn C. Dowell and his wife. It is to be remembered that possession of such written authority was claimed by the defendant not only in the trial below but in this court, and he doubtless made the same representation to the examining psychiatrist. It is not farfetched, fanciful speculation that the proffered testimony took this claimed power of attorney into account as a fact. It is notable that the witness was asked, "Did Rhodes knowingly make a false statement," not was he mentally *capable* of doing so. The latter inquiry, which would have been relevant, was omitted; the former was not properly addressed to this witness. Of the truth of the existence of a power of attorney Dr. Owen, of course, knew no more than the jury, and was entitled to express no professional opinion.

The answer, it should be made clear, is not objectionable as conclusionary, for an expert may state his conclusions drawn from findings which he is able to make within the

area of his special knowledge. Rather the infirmity of Dr. Owen's answer is that it in no way appears to relate to such area, but expresses an opinion in terms fully applicable to the issue of fact of a non-medical character then in dispute before the jury. No opinion as to mental capacity or impairment was sought or elicited. Merely showing a witness' qualifications to express an opinion as to mental disorder is not equivalent to testimony of mental disorder. The proper way would have been to ask the witness to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity *knowingly* to make the false statement charged, or *knowingly* to forge the signatures of the Dowells. Not a word along this line is to be found in the record.

We fully agree with the earnest contention of appellant's counsel, that the rules of evidence should not be applied in such a way as to interpose unnecessary barriers to communication between lawyers and physicians who appear as witnesses. However, the defense, if it had anything to communicate, failed not on account of barriers put in its path, but because of its own default on this issue. The court did not exclude psychiatric testimony. Actually, none was offered, although the witness was a psychiatrist.

The remaining contentions of the defendant may be disposed of briefly. It is objected that intervention by the presiding judge in the examination of witnesses exhibited a partiality on his part. We are satisfied from the record that there is no basis for this complaint. Such questions as the Judge addressed to witnesses were calculated to clarify their testimony. They did not exceed reasonable limits and were not weighted against the defendant.

Nor do we find error in the Judge's additional instruction given after the jury had deliberated for several hours. He instructed them substantially in accordance with *Allen v. United States*, 164 U. S 492 (1896). We take occasion to repeat what we recently said in *Orthopedic Equipment Co., Incorporated, v. Dennis Eutsler*, 276 F. 2d 455, 463 (4th Cir., 1960):

> "It is proper for the judge to admonish jurors who are in disagreement to re-examine their opinions in light of the contrary opinions of their fellows, provided it is made equally clear that the jury's verdict must represent the final judgment of each juror, and not merely his acquiescence in a majority view of which he remains conscientiously unconvinced."

That was a civil case. Even more imperative is it in a criminal prosecution to insist that each juror must be conscientiously convinced of guilt, and that if after giving deferential consideration to the opinions of his fellow jurors, he remains unconvinced, he should not join in a verdict merely because he finds himself in minority. The verdict must be the unanimous judgment of twelve jurors. We do not find, however, that in this case the Judge failed to make this clear.

Affirmed.

I concur in the result
John Paul,
Dist. Judge.

APPENDIX II—(*Continued*)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8043.

Charles G. Rhodes, *Appellant*,
vs.
United States of America, *Appellee*.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington.

It is ordered that the mandate of this Court in the above entitled case be, and it is hereby, stayed pending the application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court, provided the application for a writ of certiorari is filed in the Supreme Court within the time provided by law.

September 6, 1960.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

A true copy.
Teste:

RICHARD M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals for the Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.

APPENDIX II—(*Continued*)

JUDGMENT

UNITED COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8043.

Charles G. Rhodes, *Appellant*,
vs.
United States of America, *Appellee*.

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

JOHN PAUL,
United States District Judge.

United States District Judge.

*Judge Roby C. Thompson, who concurred in the opinion, died before the filing and announcement.

Filed Aug. 11, 1960. R. M. F. Williams, Jr., Clerk.

A true copy,
Teste:

RICHARD M. F. WILLIAMS, JR.,
Clerk, U. S. Court of Appeals for
the Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.

(Seal U. S. District Court of Appeals for the Fourth Circuit)

APPENDIX III

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1960.

Charles G. Rhodes, *Petitioner*,

v.

United States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 10th, 1960.

(s) EARL WARREN
Chief Justice of the United States.

Dated this 8th day of September, 1960.

APPENDIX IV

18 USC, Section 1014

Section 1014—Loan and credit applications generally; renewals and discounts; crop insurance.

Whoever knowingly makes any false statement or report, or wilfully over-values any land, property or security, for the purpose of influencing in any way the action of . . . any federal intermediate credit bank, . . . or any division, officer, or employee thereof, or of any corporation organized under sections 1131-1134 m of Title 12 or a federal home land bank, . . ., a federal savings and loan association, . . . upon any application, . . . or loan, . . . shall be fined not more than five thousand dollars or imprisoned not more than two years, or both.

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 2 1960
JAMES R. BROWNING, Clerk

No. 462

In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLES G. RHODES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 462

CHARLES G. RHODES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. III, 35–42; Pet. 34–40)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1960 (Pet. 42–43). Mr. Chief Justice Warren extended the time for filing a petition for a writ of certiorari to October 10, 1960, and the petition was filed on October 3, 1960 (Pet. 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record consists of three separately paginated volumes. Volume II constitutes the reporter's transcript of the trial and will be referred to as "Tr." Volumes I and III contain the proceedings in the district court and the court of appeals.

872880—60

QUESTIONS PRESENTED

1. Whether, in a trial for willfully making false statements, the trial court properly refused to permit a psychiatrist to state whether in her view the petitioner knowingly made false statements.

2. Whether petitioner had a fair trial.

STATUTE INVOLVED

18 U.S.C. 1014 provides in pertinent part:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of * * * a Federal Savings and Loan Association * * * upon any application, * * * or loan, * * * shall be fined not more than $5,000 or imprisoned not more than two years, or both.

STATEMENT

In the District Court for the Southern District of West Virginia, petitioner was convicted of willfully filing false statements and reports with the Huntington Federal Savings and Loan Association in order to obtain a $20,000 loan, in violation of 18 U.S.C. 1014, *supra* (Vol. I, 4–3; Tr. 277–279). On January 4, 1960, petitioner was sentenced to serve a prison term of twenty-two months and to pay a fine of $3,000 (Vol. I, 14; Pet. 25–26). On appeal, the conviction was affirmed, one judge concurring in the result (Pet. 34–40).

The evidence showed that, from about 1948 to about 1958, petitioner, who owned a real estate business in Huntington, West Virginia, managed and collected rents of the Ashworth Apartments in Huntington.

owned by Dr. Glen C. Dowell, a resident of Ohio. In December 1954, petitioner obtained a $20,000 loan from the Huntington Federal Savings and Loan Association secured by a deed of trust on the Ashworth Apartments (Tr. 6–7, 9–11, 51–54, 64–67, 90, 125). Petitioner signed the name "Glen C. Dowell" on a $20,000 promissory note to the savings and loan association, on a deed of trust, and on a check representing the proceeds of the loan. At petitioner's request, one of his employees signed the name "Norma L. Dowell" (the wife of Dr. Dowell) to these documents (Tr. 99–103, 119; see Tr. 107–108).

Dr. and Mrs. Dowell were unaware that a loan had been made on their Huntington property or that their names were signed to the note, check and deed of trust (Tr. 64–68, 90, 92–95, 125). Dr. Dowell testified that petitioner was authorized to make minor repairs up to $500 or $600, but that major repairs and expenditures had to be approved by the doctor (Tr. 80–85).

ARGUMENT

1. At the trial, petitioner sought to introduce the testimony of Dr. Thelma V. Owen, a psychiatrist who had interviewed the petitioner for one hour on each of two occasions in November 1959. Knowing that there would be objection, the court heard the testimony in the absence of the jury (Tr. 181). After establishing the witness's qualifications, petitioner's counsel asked the following questions (Tr. 189–190):

> Q. Now I will ask you, Doctor Owen, based upon your psychiatric examination and study of Charles Rhodes, in your opinion did Charles

> Rhodes knowingly make a false statement when he signed the name of Glen C. Dowell and caused the name of Norma L. Dowell to be made to a deed of trust and note and delivered them to the Huntington Federal Savings and Loan Association on December 31, 1954?
>
> * * * * *
>
> Q. Based upon your psychiatrist examination and study of Charles Rhodes, in your opinion did he knowingly forge the name of Glen C. Dowell and knowingly cause the name of Norma L. Dowell to be forged to the said note and deed of trust?

The doctor's answer was merely that in her opinion petitioner did not. The court held the testimony inadmissible.

The ruling was clearly correct. The questions were improper in substance in that they assumed that Dr. Owen, a psychiatrist, understood the legal definition of "knowingly" as used in the statute and called upon her to pass upon petitioner's guilt without reference to the evidence adduced at the trial. Moreover, no factual basis for the opinion of Dr. Owen was established. She was not asked, nor did she state anything about the mental capacity, motives, behavior, emotions or intent of the petitioner either at the time of her two interviews with him or at the time he applied for the loans in December 1954. She was not asked for nor did she state any diagnosis of the petitioner.

It is settled law that, in admitting expert testimony, a factual basis, hypothetical or otherwise, for the opinion or conclusions of the expert must be indicated. *United States* v. *Alker*, 260 F. 2d 135, 155 (C.A. 3), cer-

tiorari denied, 359 U.S. 906; *Carpenter* v. *United States*, 264 F. 2d 565, 570–571 (C.A. 4), certiorari denied, 360 U.S. 936; *Blunt* v. *United States*, 244 F. 2d 355, 364–365 (C.A. D.C.); *Tri-Angle Club, Inc.* v. *United States*, 265 F. 2d 829, 832 (C.A. 8); *Greenbaum* v. *United States*, 80 F. 2d 113, 121 (C.A. 9). The basis for Dr. Owen's conclusions was especially significant here since one of the defenses which petitioner advanced at the trial was that his conduct was authorized by a power of attorney from Dr. Glen Dowell (Tr. 139, 144, 149–150, 157–158, 169–171, 175–177, 215–218, 222–223, 239, 241, 253–255), and one possible interpretation of Dr. Owens' testimony was simply that she believed that claim.

2. There is no merit to petitioner's contention that he was denied a fair and impartial trial.

a. Although the court did question, for brief periods, some of the Government and defense witnesses (*e.g.*, Tr. 16–18, 30–33, 38–40, 65–66, 84–85, 142, 243, 247–248), examination of the instances cited by petitioner shows that the court's purpose was simply to clarify the testimony. The court of appeals was "satisfied from the record" that there was no basis for petitioner's complaint. It said (Pet. 39):

> Such questions as the Judge addressed to witnesses were calculated to clarify their testimony. They did not exceed reasonable limits and were not weighted against the defendant.

Moreover, the court instructed the jury that they were the exclusive judges of the facts of the case, the credibility of the witnesses, and the weight to be

honest and equally intelligent with himself or herself.

Now, as I have told you before, it is the duty of jurors to decide cases if they can conscientiously do so.

Now, return to your jury room, discuss the case fully and fairly with each other, and see if you are not able to reach a verdict.

Petitioner contends (Pet. 22) that there was no need to give this supplemental instruction because the substance of that charge was included in the court's original instructions to the jury, and that, in any event, the supplemental instruction was improper because it left the jury "with the impression that the Court insisted upon a verdict." There is no merit to the contention.

It was not improper for the court, in its supplemental instructions, to impress upon the jury their duties with regard to the case when an actual deadlock did arise. Nor was the supplemental charge coercive. The first part of that charge was taken practically verbatim from the charge which this Court approved in *Allen* v. *United States*, 164 U.S. 492, 501, while the latter portion was taken directly from the Court's rationale in *Allen*. *Id.* at 501-502. That the court gave the supplemental charge to the jury on its own motion is of no particular moment. *Weathers* v. *United States*, 126 F. 2d 118, 119-120 (C.A. 5); *Dwyer* v. *United States*, 17 F. 2d 696, 698 (C.A. 2), certiorari denied, 274 U.S. 756; *Hagans* v. *United States*, 261 F. 2d 924, 927-928 (C.A. 5). See *Allis* v. *United States*, 155 U.S. 117; *United States* v.

McGuire, 64 F. 2d 485, 493 (C.A. 2), certiorari denied, 290 U.S. 645.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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